

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SEVENTH REGION

LITCHFIELD NURSING CENTRE

Employer

and

CASE 7-RC-21599

SERVICE EMPLOYEES INTERNATIONAL UNION,  
LOCAL 79, AFL-CIO, CLC

Petitioner

APPEARANCES:

Daniel Pierce, of Lincoln Park, Michigan, for the Employer.  
Rita L. Smith, Attorney, of Detroit, Michigan, for the Petitioner.

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,<sup>1</sup> the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

---

<sup>1</sup> The Petitioner filed a brief, which has been carefully considered.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

The Employer operates an 81 bed skilled nursing facility in Litchfield, Michigan, at which it provides nursing care currently to 68 residents. The Employer employs 19 nurses and 23 certified nursing assistants (CNAs) to provide nursing services to these residents. Of these 19 nurses, 14 are licensed practical nurses (LPNs), and 5 are registered nurses (RNs). The Employer and Petitioner stipulated that 4 of these 14 LPNs hire, fire and discipline employees and are supervisors within the meaning of Section 2(11) of the Act.<sup>2</sup> The Petitioner seeks to represent a unit of the remaining 10 full-time and regular part-time LPNs employed by the facility. Contrary to the Petitioner, the Employer contends that all of its 19 nurses are supervisors. According to the Employer, the 10 LPNs that the Petitioner is seeking to represent are scheduled at least once or twice per week to serve as a "charge nurse," which the Employer asserts is a supervisory position.

The Employer's facility is divided into various unidentified departments, including the nursing department at issue. The physical facility is divided into three wings, North, Center and South. Service and maintenance functions are located in the Center wing. There are 27 "non-medical" employees. The North and South wings are patient care areas, which are further divided into sections for purposes of personnel assignment. The facility operates three shifts, seven days a week, with a half hour shift overlap (essentially for purposes of briefing the next shift as to the condition of the residents). First shift is 6:30 a.m. - 3:00 p.m., second shift is 2:30 p.m. - 11:00 p.m., and third shift is 10:30 a.m. - 7:00 a.m.

The individual responsible for the overall operation of the facility is Administrator Terry Esterline. The overall head of nursing services is Director of Nursing Donna Luckadoo. The parties stipulated that Administrator Esterline and Director of Nursing Luckadoo are supervisors within the meaning of Section 2(11) of the Act. Among the four LPNs who were also stipulated to be supervisors, Staffing Director Carmela Biron participates in the interviewing of applicants and is responsible for scheduling the work of the CNAs. The schedule ordinarily determines breaks and lunch, although a charge nurse may determine the order of breaks or vary these times depending on patient need. Biron also schedules which LPN is to serve as charge nurse on a particular day and shift. By making these assignments, Biron determines which section of a wing, and corresponding patients of that assigned section,

---

<sup>2</sup> Identified as Carmela Biron, Karen Chamberlain, Marcy Farmer and Julie Kittle. Biron is Staffing Director and in charge of staff development. The titles of the others were not identified, but they were noted to attend meetings of departmental heads.

the nursing staff will service. Assignment of particular aides to residents may be done by the charge nurse from the scheduling sheet, although areas of the wing to be serviced are ordinarily determined by the order of names on the schedule. Biron evaluates the performance of CNAs, and approves bonuses for CNAs. Biron also may counsel and discipline CNAs without the knowledge of the charge nurse. Biron is generally present at the facility seven days a week. Esterline and Luckadoo are present at the facility 8:00 a.m. - 4:00 p.m. during the day shift, Monday through Friday, have pager numbers, and are on-call after hours should the need arise to contact them. An RN unit coordinator (e.g., Toni Sharpe, first shift), to whom charge nurses directly report, is also on duty to assist nursing staff.

Each resident care wing on each shift is staffed by CNAs and nurses so as to meet State requirements for patient care. Direct patient care at the facility is provided by the approximately 23 CNAs, whom Petitioner currently represents in a service and maintenance unit, and the petitioned-for LPNs. On each shift, in each of the North and South wings, one of the nurses (an LPN or RN) is scheduled to sign in as the "charge nurse" for that wing. LPNs are rotated on the schedule at least a couple of times a week to serve as charge nurses. It is the duty of the charge nurse to insure that the patients are properly cared for. When serving as a charge nurse for a particular wing on a shift, the LPN locates herself at a nurse's station. The charge nurse reviews the patient reports, writes an IV list, monitors patients' vital signs and charts that information for each resident in the section assigned. During the half hour shift change, the charge nurse briefs the incoming staff as to the status of the patients in the section. Toward the goal of providing proper patient care, charge nurses essentially oversee the administration of patient care during their shift. Biron assigns the CNAs who will work the shift. A charge nurse may further assign resident areas to CNAs by writing their names on a form in the section to which they were assigned by Biron. Assignment of resident areas to the CNAs is usually made according to their order of appearance on the scheduling sheet.

In furtherance of assuring appropriate patient care, the charge nurse monitors CNAs as to their assigned patient care tasks. Overall, the patient care work of the CNA is routine and repetitive (feed, toilet, bathe, change residents, etc.) such that the CNAs know what duties they are to perform without having to be told. Any assignment and direction by the charge nurse to nursing assistants typically involves little more than observing that the usual basic care is being done. If the work is not being done, or if a charge nurse has any problem with a CNA not following facility rules and regulations, the charge nurse will first instruct the employee what should be done to comply. Absent voluntary compliance, the charge nurse completes a counseling form<sup>3</sup> merely to report the pertinent facts to her superiors (the unit coordinator, DON and Administrator) who make the decision, without recommendation or further input from the charge nurse whether to undertake any action. Supervisor Biron may even take it upon herself to counsel or discipline a CNA as to a deficiency without the knowledge of the charge nurse. There is also almost always an RN (unit coordinator) on duty at the facility. Charge nurses may also

---

<sup>3</sup> No example of such a form was offered into evidence.

complete incident reports, providing a factual account of any unusual event involving a resident, such as injury or unauthorized exit. These reports are entered into the 24-hour report book and given to the DON or Administrator for review, without further involvement of the charge nurse.

Although there are sporadic instances when a charge nurse has verbally informed an employee of patient care deficiencies, charge nurses testified that they do not perform written performance evaluations of nursing assistants.<sup>4</sup> Only rarely do charge nurses complete a written counseling form of a nursing assistant. This form is given to the DON or Administrator to report an incident by an employee, such as swearing, without any recommended action or further involvement of the charge nurse. Charge nurses do not have access to employee personnel files. Charge nurses do not otherwise discipline employees or make disciplinary recommendations. At one time charge nurses apparently had the authority to send nursing assistants home,<sup>5</sup> but presently they first consult with superiors, who remain on-call even after hours. There is no evidence of any recent exercise of any authority by a charge nurse, in the absence of superiors, to send home a CNA suspected of intoxication or patient abuse, even though this situation could endanger proper care of the residents.

Charge nurses punch a time clock and as LPNs they receive an hourly wage of \$14 - \$17. There is no evidence of any wage differential when an LPN serves as a charge nurse. They normally work a 40 hour week. Charge nurses report to their unit coordinator,<sup>6</sup> whom they apparently consider to be their immediate supervisor. The entire nursing staff reports to DON Luckadoo, who reports to Administrator Esterline. Charge nurses attend in-service meetings pertaining to patient care, but do not attend the supervisory department head meetings attended by those whom the parties agree to be supervisors. While CNAs provide most of the direct patient care, charge nurses devote much of their shift to providing direct patient care as it is the charge nurse who passes medications and monitors vital signs of patients. When not serving as a charge nurse, LPNs perform the routine patient care similar to that provided by a nursing assistant.

If a CNA requests to leave the facility during work time, such as for reasons of illness, the charge nurse will ordinarily first seek approval from her superiors, such as Biron, when possible, as Biron approves time off for CNAs. However, under limited circumstances where a superior is absent and a CNA is ill, a charge nurse may on her own allow a CNA to leave rather than risk infection of the residents. Otherwise, a charge nurse does not grant leave. Biron is generally responsible for scheduling and staffing. If a CNA who has not yet reported for work calls the facility to report an absence, she usually telephones the DON or staffing director, but a charge nurse may answer the phone and take an absence report, which is then given to the DON or

---

<sup>4</sup> There is evidence that charge nurses did annually evaluate the performance of nursing assistants several years ago, but that this authority was removed and now reposes with LPN supervisor Carmela Biron.

<sup>5</sup> For example, LPN Bush testified that 10-15 years ago she sent an employee home for fighting with a patient, but now she could not do so without first calling the DON or Biron for approval.

<sup>6</sup> The only unit coordinator identified in the record is Toni Sharpe.

staffing director so they know who will be off work for staffing purposes. RN Sue Cogswell, who also trains CNAs, and Unit Coordinator Toni Sharpe, are generally charged with calling in any needed staff in the event of absences. Only if a superior is unavailable to secure necessary personnel to meet the legally mandated minimum staffing requirements, as might be true on the weekend, does a charge nurse go down a seniority list of CNAs pursuant to procedures set forth in the CNA collective bargaining agreement and call to seek volunteers. If there are no volunteers, by reverse seniority the charge nurse may require existing staff to work overtime as needed. The charge nurse may initial a time card of a CNA to verify time of arrival or departure if the time card machine is not working, or record overtime or bonus entitlement on a time card for a CNA coming in or staying over when needed to meet staffing requirements. The charge nurse under such circumstances might also arrange with a charge nurse from another wing for a temporary transfer of a CNA in order to insure that staffing ratios are met. Charge nurses otherwise have no authority to call in or transfer employees.

Section 2(11) of the Act defines the term supervisor as follows:

. . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

An employee need only possess any one of the above-enumerated authorities in order to come within the definition, as long as said individual exercises such authority and does so in the interest of the employer, using independent judgment. *NLRB v. Health Care & Retirement Corp.*, 114 S. Ct. 1778, 146 LRRM 2321 (1994); *Phelps Community Medical Center*, 295 NLRB 486 (1989); *Cannon Industries*, 291 NLRB 632 (1988); *Big Rivers Electric Corp.*, 266 NLRB 380, 382 (1983); *Frederick's Foodland*, 247 NLRB 284, 290-91 (1980).

The legislative history of Section 2(11) indicates that Congress intended to distinguish between employees who merely give assignment or direction of a routine or clerical nature in overseeing the work of others, and who are not part of management, from those supervisors truly vested with genuine management prerogatives. *George C. Foss Co.*, 270 NLRB 232, 234 (1984). The exercise of independent judgment in the performance of an assertedly supervisory task must be of more than a routine or clerical nature. *Schnuck Markets v. NLRB*, 961 F.2d 700, 703 (8th Cir. 1992), and more than sporadic or infrequent. *Somerset Welding & Steel*, 291 NLRB 913 (1988). Routine and perfunctory assignment and direction by health care employees to aides incidental to their performance of routine and repetitive daily patient care is not sufficient to indicate independent judgment. *Crittenton Hospital*, 328 NLRB No. 120 (June 30, 1999); *Youville Health Care Center*, 326 NLRB No.52 (Aug. 27, 1998); *Beverly Enterprises v. NLRB*, 156 LRRM 2869 (D.C. Cir. 1997).

In the instant matter, charge nurses have no authority to hire, discipline, discharge, suspend, promote, reward, adjust grievances, lay off or recall employees, and there is little evidence that they have authority to make such recommendations or that any recommendations offered generally have been effective. Charge nurses do not interview candidates for hire, typically do not attend job interviews, and are not consulted regarding hiring decisions. Charge nurses have no authority to promote or reward employees. They may make timecard notations to verify hours worked so that an employee can qualify for a bonus or overtime, but this is purely ministerial.

Charge nurses do not possess supervisory authority with respect to discipline. At most, they infrequently complete counseling form reports which factually report CNA performance lapses to the DON or Administrator. The charge nurses do not issue discipline or make any recommendations in connection with these reports. It is the DON or Administrator who determines discipline following investigation of the incident, without further involvement or input from the charge nurse. In the interest of patient care, the charge nurses may send home a CNA whose condition or behavior endangers patient care, but the record reflects this would occur rarely, and no specific incident of the exercise of such authority was provided. Even in these situations, it is the charge nurse's superiors who investigate any incident and issue any discipline. Issuance of written counseling reports involving mere factual reporting which do not alone affect job status or tenure does not demonstrate supervisory authority. ***Ohio Masonic Home***, 295 NLRB 390 (1989). It is the charge nurse's superiors who are responsible for making independent determinations as to discipline of the CNAs, not the charge nurses. ***Passavant Health Center***, 284 NLRB 887 (1987); ***Heritage Manor Convalescent Center***, 269 NLRB 408, 413 (1984).

Charge nurses themselves spend a significant portion of their time performing patient care work, including the same duties as the CNAs, which also militates against a supervisory finding. ***Latas de Alumno Reynolds***, 276 NLRB 1313 (1985). Additionally, after hours there are afternoon and midnight supervisors to oversee facility operations, and the Administrator and DON are on-call if problems arise after hours. ***Riverchase Health Care Center***, 304 NLRB (1991); ***Waverly-Cedar Falls Health Care***, 297 NLRB 390 (1989). Any staffing calls by charge nurses to CNAs seeking volunteers or requiring overtime by charge nurses is infrequent and done by seniority per the collective bargaining agreement when no other appropriate management official is present at the facility. Such emergency decisions essential to the critical needs of patient health and well-being do not involve discretionary exercise of judgment essential to supervisory status. ***Youville Health Care Center, Inc.***, supra; ***Providence Hospital***, 320 NLRB 717, 732 (1996), enf'd sub nom. ***Providence Alaska Medical Center v. NLRB***, 121 F.3d 548 (9th Cir. 1997).

The authority to transfer is limited to the occasional temporary reassignment of a CNA in the absence of superiors at the facility in order to meet mandatory legal minimum staffing requirements. The assignment and direction of CNAs is limited to making perfunctory patient assignments based on a schedule, and monitoring daily basic care activities of CNAs,

unaccompanied by authority to enforce any failure of the CNAs to heed such assignments and directions of the charge nurse.

The routine and repetitive nature of the work of the CNAs is such that any responsibility of the charge nurse to assign and direct their work is limited and ministerial. The Board has repeatedly determined that the exercise of limited authority over lesser skilled employees regarding such assignment or direction does not entail the independent judgment necessary to establish supervisory status. *Crittenton Hospital*, supra; *Youville Health Care Center*, supra.

Although the Employer emphasized the job description of the charge nurse as demonstrating supervisory authority, mere paper authority which is unexercised does not establish supervisory authority. *Crittenton Hospital*, supra; *East Village Nursing & Rehabilitation Center v. NLRB*, 165 F.3d 960 (D.C. Cir. 1999). The charge nurse job description herein bears little relationship to practice. Thus, charge nurses testified that contrary to their job description, for several years they have not performed evaluations of CNAs. Similarly, charge nurses have not initiated discipline, or even recommend the same.

Finally, the Employer urges it would have no supervisors after hours and on weekends if the charge nurses are not supervisors. However, admitted supervisory and managerial employees remain on-call during these periods, and the absence of on-site supervision during certain periods is not itself determinative of supervisory status. *Youville Health Care Center*, supra.

Furthermore, supervisory ratios would be outrageously unrealistic if charge nurses were supervisors. The Employer admitted that if its position is adopted as to the supervisory status of its nursing staff, there would be 19 supervisors for the 23 CNAs in its nursing department.<sup>7</sup> Indeed, the number of acknowledged supervisors for the nursing department is even greater if facility Administrator Esterline and Director of Nursing Luckadoo are counted. On the other hand, if the 10 LPNs which the Petitioner is seeking to represent are not supervisors,<sup>8</sup> while the ranks of supervisors would still be "pretty populous," the supervisor to employee ratio becomes a more tenable and realistic ratio of about 1:3 or 1:4. *Beverly California Corp. v. NLRB*, 970 F.2d 1548, 1555; 140 LRRM 2960 (6th Cir. 1992).

5. Accordingly, for the foregoing reasons, I conclude that the LPNs are not supervisors within the meaning of Section 2(11) of the Act. I find that the following employees constitute an appropriate unit of employees for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

---

<sup>7</sup> Although not stipulated, it appears from the record testimony of charge nurses that Unit Coordinator Sharpe is a supervisor as defined by the Act.

<sup>8</sup> I make no finding as to the five RNs, some or all of whom it appears from the record may hold supervisory status as unit coordinators.

All full-time and regular part-time licensed practical nurses employed by the Employer at its facility located at 527 Marshall Road, Litchfield, Michigan, but excluding all other employees, guards and supervisors, as defined in the Act.

Those eligible to vote shall vote as set forth above and in the attached Direction of Election.

Dated at Detroit, Michigan, this 23<sup>rd</sup> day of July, 1999.

(SEAL)

/s/ William C. Schaub, Jr.  
William C. Schaub, Jr., Regional Director  
National Labor Relations Board  
Region Seven  
Patrick V. McNamara Federal Building  
477 Michigan Avenue - Room 300  
Detroit, Michigan 48226-2569

177-8580-8050

177-8560-2800